MEDICON PLASTIC INDUSTRIES SDN. BHD

v.

SYARIKAT COSA SDN. BHD. & ANOTHER CASE

COURT OF APPEAL, KUALA LUMPUR
DATO' V.C. GEORGE JCA,
DATO' HJ. ABU MANSOR BIN ALI JCA,
TUAN GOPAL SRI RAM JCA
[CIVIL APPEAL NO. W 02-12-94]
8 MAY 1995

***CONTRACT**: Purchase of machinery - Allegation that machinery purchased failed to meet specifications, was not merchantable and was not fit for the purpose for which it was bought - Machinery bought from agent of principal resident overseas - Claim for damages suffered - Whether the respondent/agent could rely on s. 16(l)(a) of the Sale of Goods Act 1957 and the proviso thereto - Whether the plaintiff had proved liability on the part of either the manufacturers or the respondents.*

***DAMAGES**: Claim for damages suffered on the purchase of allegedly defective machinery - Claim for special damages and general damages - Whether claim for damages proved to the satisfaction of the Court.*

The plaintiffs/appellants sued the defendants/respondents for damages said to have been suffered as a result of their purchase of two items of machinery, an Alpla blow moulding machine (the Alpla) and a Boe-Therm temperature controller (the Boe-Therm). The contract of sales was entered into with the defendant as agent for their foreign principals.

The plaintiff alleged that the Alpla failed to meet specifications, was not merchantable and was not fit for the purpose for which it was bought and that the Boe-Therm was supplied minus what was referred to as a heating element and as such was not fit for the purpose for which it was bought.

The defendants contended that the contract for the sale of each of the machines was for a specified article under its patent or trade name and relying on the proviso to s. 16(l)(a) of the Sale of Goods Act 1957 (the Act), argued that there was no implied condition as to the fitness of the equipment. The defendants further contended that anything wrong with the Alpla was caused by defects in the fabrication of certain parts needed to commission the machinery the fabrication of which was the responsibility of the plaintiffs and which in fact were fabricated locally at the instance of the plaintiffs.

The learned trial Judge found in favour of the defendants and the plaintiffs appealed.

Held:

V.C. George JCA (delivering the judgment of the Court):

[1] The plaintiffs' witness PW2 had visited the manufacturer's factory in Austria to, inspect the type of machines to be ordered. The Alpla that was eventually ordered was ordered because it was recommended to the plaintiffs by PW2. It was ordered with specifications to meet the plaintiffs special requirements. From the evidence adduced it was clear that the plaintiffs had relied on the seller's skill resulting in there being an implied condition that the machines would be reasonably fit for the purpose for which they were required. In the circumstances the learned Judge was wrong in applying the proviso to s. 16(l)(a) of the Act on the facts of the instant case.

[2] On the allegation that the Boe-Therm was not supplied with a heating element, the plaintiffs had failed to prove that the Boe-Therm was to be supplied with the heating section or element. The offer made to the plaintiffs expressly excluded the heating element and that appears to be the offer that was accepted. Consistent with that there is no record of the plaintiffs taking issue contemporaneously with the defendants or the manufacturer in respect of the "without heating" aspect of the machine.

[3] In any event how and to what extent the lack of the heating element in the Boe-Therm affected the plaintiffs has not been explained or explained with the clarity expected of a plaintiff suing for damages. In the circumstances, the finding of the trial Judge on this aspect of the matter had to be and was affirmed.

[4] It was clear that the major defects complained of in the Alpla were in respect of the moulds fabricated locally. On the totality of the evidence it was clear that it was for the plaintiffs to have had the moulds fabricated. There was no evidence for the Court to hold that the manufacturers' design drawings caused the mould maker to make defective moulds especially as the mould maker's evidence was that he had been instructed by the plaintiffs not to follow "100%" the drawings. In the circumstances the plaintiffs had failed to prove liability on the part of either the manufacturer or the defendants and the learned Judge's judgment on issue had to be and was upheld.

[5] A claim for special damages and/or general damages has to be based on evidence of damages suffered. Insofar as the claim for special damages was concerned, no attempt or effective attempt had been made to prove the special damages claimed. In the circumstances, the rejection by the learned Judge of the claim for special damages is affirmed.

[6] On the question of general damages there was claim for RM275,000 said to be reimbursement to be paid to PWI in respect of a guarantee. The plaintiffs have failed to prove the nexus between the guaranteed amount and the alleged breaches of the contract *vis-a-vis* the Alpla and the Boe-Therm. Similarly the nexus between the claim for "RM200,000 being paid up capital ... which was completely dissipated" and the contract for the purchase of the two machines has not been shown and it follows that there is no basis for this head of damages as against the defendants.

[7] As for the claim for loss of expected profits, the figures quoted were based on projections made to support the plaintiffs' application to the bank for credit facilities. The projections to be worth anything should have been backed by evidence of *inter alia* wages to be incurred, costs of materials, actual prices at which the goods were to be sold and so on. In the absence of such evidence or of the like, the basis of the projection and the projections themselves appear to be mere speculation. In the circumstances the learned Judge was perfectly justified in rejecting them as being mere "conjecture".

[Appeal dismissed with costs]

*[**Bahasa Malaysia** Translation of Headnote]*

***KONTRAK:** Pembelian mesin-mesin - Pengataan bahawa mesin-mesin yang dibeli gagal memenuhi spesifikasi, tidak boleh dijual dan tidak sesuai bagi tujuan ianya dibeli - Mesin-mesin dibeli daripada ejen syarikat utama yang bermastautin di luar negeri - Tuntutan bagi gantirugi yang dialami - Samada responden/ejen dapat bergantung pada s. 16(l)(a) Akta Penjualan Barangan 1957 dan proviso yang terdapat di dalamnya - Samada plaintif telah membuktikan tanggungan dipihak samada pengilang atau responden-responden tersebut.*

GANTIRUGI: *Tuntutan untuk gantirugi yang dialami atas pembelian mesin-mesin yang dikatakan tidak sempurna - Tuntutan untuk gantirugi khas dan gantirugi am - Samada bukti tuntutan untuk gantirugi memuaskan Mahkamah.*

Plaintif-plaintif/perayu-perayu telah mendakwa defendan-defendan/responden-responden untuk mendapatkan gantirugi yang dikatakan telah dialami akibat pembelian dua buah mesin, sebuah mesin pengacuan tiup Alpla (Alpla tersebut) dan sebuah pengawal suhu Boe-Therm (Boe-Therm tersebut). Kontrak jualan telah dimasuki dengan defendan sebagai ejen bagi syarikat utama mereka di luar negeri.

Plaintif mengatakan bahawa Alpla tersebut telah gagal memenuhi spesifikasi, tidak boleh dijual dan tidak sesuai bagi tujuan ianya dibeli dan bahawa Boe-Therm tersebut telah dibekalkan tanpa apa yang dikatakan unsur pemanasan dan dengan yang sedemikian tidak sesuai untuk maksudnya.

Defendan telah menegaskan bahawa kontrak untuk jualan setiap satu mesin-mesin tersebut adalah untuk perkara yang telah ditentukan di bawah patennya atau pun nama perdagangannya dan bergantung kepada proviso s. 16(l)(a) Akta Penjualan Barangan 1957 (Akta tersebut), berhujah bahawa tidak terdapat syarat-syarat yang tersirat berhubung dengan kesesuaian peralatan tersebut. Defendan selanjutnya menegaskan bahawa apa-apa yang rosak atau yang tidak memuaskan berhubung dengan Alpla tersebut telah disebabkan oleh kecacatan dalam pemasangan-siap bahagian-bahagian yang tertentu yang diperlukan bagi memulakan penggunaan mesin itu di mana pemasangan-siap adalah tanggungjawab plaintif dan yang mana sebenarnya telah dibuat di negeri ini atas permintaan plaintif.

Tuan Hakim perbicaraan yang bijaksana telah membuat keputusan yang memihak kepada defendan dan plaintif telah merayu.

Diputuskan:

V.C. George HMR (menyampaikan penghakiman Mahkamah):

[1] Saksi plaintif, PW2, telah melawat kilang pengilang di Austria, untuk memeriksa jenis mesin yang akan dipesan. Alpla tersebut yang akhirnya telah dipesan telah sebenarnya dipesan kerana ianya telah disyorkan oleh PW2 kepada plaintif. Ianya telah dipesan dengan spesifikasi bagi memenuhi kehendak-kehendak khas plaintif. Daripada keterangan yang dikemukakan ianya jelas bahawa plaintif telah bergantung pada kemahiran penjual yang mengakibatkan terdapatnya syarat tersirat bahawa mesin tersebut akan berada dalam keadaan baik yang sewajarnya sesuai bagi tujuan yang ianya diperlukan. Dalam keadaan yang sedemikian, Tuan Hakim yang bijaksana salah dalam memakai proviso kepada s. 16(l)(a) Akta tersebut ke atas fakta-fakta kes ini.

[2] Atas pengataan bahawa Boe-Therm tersebut telah dibekalkan tanpa unsur pemanasan, plaintif telah gagal membuktikan bahawa Boe-Therm tersebut haruslah dibekalkan dengan alat atau unsur pemanasan. Tawaran yang dibuat kepada plaintif dengan nyatanya tidak termasuk unsur pemanasan dan itulah kelihatannya tawaran yang telah diterima. Konsisten dengan keadaan itu, tidak terdapat rekod plaintif mengambil isu semasa dengan defendan atau pengilang tersebut berhubung dengan aspek "tanpa unsur pemanasan" mesin tersebut.

[3] Dalam apa keadaan pun dan kepada had apa ketiadaan unsur pemanasan tersebut di dalam Boe-Therm itu menjejaskan plaintif telah tidak diterangkan atau diterangkan dengan jelasnya sebagaimana yang diharapkan oleh plaintif yang mendakwa untuk gantirugi. Dalam keadaan yang sedemikian, keputusan Hakim perbicaraan atas aspek ini bagi perkara tersebut haruslah dan telah disahkan.

[4] Ianya jelas bahawa kecacatan utama yang diadukan terdapat pada Alpla tersebut adalah berhubung dengan acuan yang dipasang-siap secara tempatan. Pada keseluruhan keterangan tersebut ianya jelas bahawa ianya adalah terletak pada plaintif untuk memasang-siap acuan-acuan tersebut. Tidak terdapat keterangan bagi Mahkamah memutuskan bahawa lukisan rekabentuk pengilang telah menyebabkan pembuat acuan membuat acuan-acuan yang cacat khususnya kerana keterangan pembuat acuan adalahh bahawa beliau telah diarah oleh plaintif untuk tidak mengikuti lukisan itu "100%". Dalam keadaan tersebut plaintif telah gagal untuk membuktikan tanggungan dipihak samada pengilang atau defendan-defendan dan penghakiman Hakim yang bijaksana haruslah dan telah dipertahankan.

[5] Tuntutan untuk gantirugi khas dan/atau gantirugi am haruslah berdasarkan keterangan gantirugi yang dialami. Sejauhmana tuntutan untuk gantirugi khas berkaitan, tidak ada percubaan atau percubaan yang berkesan yang telah dibuat untuk membuktikan tuntutan khas tersebut. Dalam keadaan yang sedemikian, penolakan oleh Tuan Hakim yang bijaksana terhadap tuntutan untuk gantirugi adalah disahkan.

[6] Berhubung dengan persoalan gantirugi am terdapatnya tuntutan bagi jumlah sebanyak RM275,000 yang dikatakan bayaran ganti yang kena dibayar kepada PW1 berhubung dengan satu gerenti. Plaintif telah gagal untuk membuktikan nexus antara jumlah yang digerentikan dan kemungkiran-kemungkiran yang dikatakan terhadap kontrak tersebut iaitu Alpla dan Boe-Therm tersebut. Begitu juga nexus antara tuntutan bagi RM200,000 yang merupakan modal berbayar... yang mana telah hilang sama sekali" dan kontrak bagi pembelian kedua-dua mesin tersebut telah tidak ditunjukkan dan adalah didapati bahawa tidak terdapat asas bagi gantirugi di bawah tajuk ini terhadap defendan.

[7] Berhubung dengan tuntutan bagi kerugian keuntungan yang dijangkakan, angka-angka yang disebut adalah berdasarkan unjuran-unjuran yang dibuat untuk menyokong permohonan plaintif kepada bank untuk kemudahan-kemudahan bank. Unjuran-unjuran tersebut untuk mempunyai nilai seharusnya disokong oleh antara lainnya gaji yang akan dialami, kos bahan-bahan, harga-harga sebenar pada mana barangan-barangan tersebut harus dijual dan seterusnya. Dalam ketiadaan keterangan yang sedemikian atau pun yang seakan itu, asas unjuran dan unjuran-unjuran itu sendiri kelihatan seperti hanya spekulasi sahaja. Dalam keadaan yang sedemikian, adalah wajar bagi Tuan Hakim yang bijaksana menolaknya sebagai hanya "tekaan" belaka.

[Rayuan ditolak dengan kos]

Cases referred to:
Baldry v. Marshall [1925] 1 KB 260 ***(refd)***
Sum Kum v. Devaki Nair & Anor. [1964] 30 MLJ 74 ***(refd)***
Cullinane v. British "Rema" Manufacturing Co. Ltd. [1954] 1 QB 292 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 183(a)
Sale of Goods Act 1957, ss. 16 & 16(1)(a)

Other source referred to:
Benjamins Sale of Goods, 3rd Edn., para. 830

For the appellants/plaintiffs - A. Kanesalingam; M/s. Kanesalingam & Co.
For the respondents/defendants - Chin Yew Meng; M/s. Allen & Gledhill

JUDGMENT

V. C. George JCA:

The appellants as plaintiffs had sued the defendants, the respondents here, for damages said to have been suffered as a result of their purchase of two items of machinery, referred to in the proceedings as an Alpla h.s. 40/2000 blow moulding machine and a Boe-Therm temperature controller respectively, the contract in respect of which sales was entered into by the defendants as agent for their foreign principals, which machinery it was alleged, in respect of the Alpla h.s. 40/2000 failed to meet specifications, was not merchantable and was not fit for the purpose it was bought and in respect of the Boe-Therm was supplied minus what was referred to as a heating element and as such was not fit for the purpose it was bought. The defendants' response to the plaintiffs' claim, shortly stated, are that they were not liable because they were only agents for the vendor their principals and that in any event both the machines met the specifications, were merchantable and fit for the purposes for which they were purchased. It was further contended that the contract for the sale of each of the machines was for a specified article under its patent or trade name and that accordingly (invoking the proviso to s. 16(1)(a) of the Sale of Goods Act, 1957) or in any event, the plaintiffs had not relied on the defendant's skill and judgment and as such there was no implied condition as to the fitness of the equipment. The defendants contend that if there was anything wrong with the Alpla it was caused by defects in the fabrication of certain parts needed to commission the machinery the fabrication of which was the responsibility of the plaintiffs and which in fact were fabricated locally at the instance of the plaintiffs. In any event the allegation that the plaintiffs suffered damages was denied and put into issue.

The case was initially disposed of by Justice Abdul Razak bin Abu Samah who had found in favour of the plaintiffs. On appeal a retrial was ordered. This was conducted before Justice Dato' Hj. Shaik Daud who dismissed the claim on the first of the many grounds taken by the defendants, that the defendants were not liable as they were only agents for their principal and had themselves not entered into any contract with the plaintiffs. Having arrived at that conclusion the learned Judge did not adjudicate the other issues raised although all the evidence that the parties wanted to adduce in respect of all the issues had been adduced and submissions in respect of them had been made. The Supreme Court allowed the plaintiffs' appeal against Justice Dato' Shaik Daud's decision holding that the defendants were in fact agents for a merchant resident abroad and were by s. 183(a) of the Contracts Act, 1950, presumed to have contracted to be bound by the contract entered into by their principals and were liable. The case was remitted to the Judge for him to adjudicate on the rest of the issues raised in the trial.

This the learned Judge did and held:

(i) (once again ignoring the s. 183(a) presumption) that there was no implied condition of fitness under s. 16 of the Sale of Goods Act 1957 because it was not the defendant who sold the equipment to the plaintiff.

(ii) that in any event the equipment was purchased under its patent or trade mark and accordingly by virtue of the proviso to s. 16(1)(a) of the Sale of Goods Act 1957 there was no implied condition as to its fitness.

(iii) that the major defects complained of in respect of the Alpla were in respect of the moulds fabricated here, not by the defendants but by mould makers commissioned by the plaintiffs.

(iv) that the Alpla functioned perfectly without the moulds and the defendants should not be held responsible for the malfunctioning of the machine when it was operated with the moulds.

(v) In respect of the allegation that the other machine i.e., the Boe-Therm Temperature Controller, had been supplied without what was referred to as a heating element, that the plaintiffs had failed to prove that the machine was to be supplied with such heating element.

(vi) In respect of damages claimed that the plaintiffs had failed to prove the special damages, that part of the claim based on a guarantee was untenable and that the claim for loss of profits is based on mere "conjecture" and fails.

The plaintiffs' claim was dismissed with costs. The plaintiffs appealed.

Counsel for both the appellants and the respondents in the course of the appeal, lead us in the course of the submissions made, through the whole of the evidence lead and the submissions that had been made in the Court below and we decided that the best way to approach this appeal, in the circumstances, was to initially ignore, as it were, the learned Judge's written judgment and review the whole case ourselves always having in mind that the learned Judge had the advantage of having seen and heard the witnesses.

Medicon Plastic Industries Sdn. Bhd., the appellants had been interested in producing in Malaysia plastic bottles with screw-on caps for the use of medical practitioners for dispensing medicine. Syarikat Cosa Sdn. Bhd. the respondents were agents for the Australia manufacturers of the Alpla h.s. 40/2000, said to be suitable for the production of plastic bottles that the appellants intended to produce. By a letter dated 1 March 1977 the respondents gave some particulars of the machine and the terms of the proposed sale. What was offered was stated to be an "Alpla blow moulding machine type h.s. 40/2000 suitable for production of plastic hollow articles, including extruder 40 mm diameter, built-in hydraulic system, without additional attachments". However, in fact there were some additional attachments specified in the offer, namely two "nitralloy steel screws" and a "single extrusion head". The price quoted was DM66,560 CIF Port Klang. The machine was stated to be covered by a "manufacturer's guarantee" of 6 months from date of delivery. The respondents were also agents of the Swiss manufacturers of the other machine, the Boe-Therm Temperature Controller Type Cool-10 which also was said to have a manufacturer's guarantee of 6 months from date of delivery. This machine was to be operated in conjunction with the Alpla blow moulding machine to control the temperature of the water used in the Alpla.

Orders were placed with the respondents for one Alpla and one Boe-Therm. Soon after delivery, and before the machines were commissioned, the appellants complained in respect of the Alpla, both to the respondents and to their principals the Australian manufacturer. In respect of the Alpla, the complaints made were that (1) an instruction manual had not been supplied (2) "there were no blow pins or cutting sleeves with the machine ...." (3) there was no "bottom deflashing devise with the machine". A demand was made for the immediate supply of the said 3 items as well as "an assortment of spare parts" and "a twin cavity 203 blow mould." It was also pointed out to the respondents that the "blow heads" as referred to in the packing list were not the ones ordered and that a part of the machine referred to as a "screw" was rusty. The petitioners also demanded a set of "machine tools". They warned the manufacturers and the respondents that they would hold them responsible for the delay caused in commissioning the machine because of the lack of the manual and the said parts.

Before moving on, we would straightaway dispose of the invocation by the respondents of s. 16(1)(a) of the Sale of Goods Act and the proviso thereto which we reproduce here:

> 16.(1) Subject to the provisions of this Ordinance and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> (a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.
>
> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

In England where there used to be a similar provision and proviso, the cases restricted the proviso to the point where it only applied if an article was ordered by its trade name - see *Benjamins Sale of Goods* 3rd Edn., para. 830 where reference is made to *Baldry v. Marshall* [1925] 1 KB 260 in which Bankes LJ suggested the following test for the operation of the proviso.

> Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great the skill or judgment may be?

In that same case Sargant LJ said:

> It seems to me that the articles which are dealt with in that proviso are primarily things like patent medicines and common articles sold under well-known trade names. In my judgment the proviso does not apply to an article like a motor car; which is sold under a very elaborate and specific description.

In the instant case PW2 had visited the manufacturer's factory in Australia to inspect the type of machines to be ordered. The Alpla that was eventually ordered was ordered because it was recommended to the plaintiffs by PW2 who, when he had been with a company called JAAF Trading had purchased and used an Alpla machine. It was ordered with specifications to meet the plaintiffs special requirements. PW2 testified (at p. 50 of the record of appeal):

> I bought the machinery from defendant. Specifications for the ABM machines was agreed between me and defendant company (see p. 38 of A). This agreement was reached after some negotiations. This was a continuation of my previous order as in p. 8 of CD.

and again at p. 51,

> I do not agree that I bought a standard ABM. Certain parts of the machine had to be made specially for us like the double blow head, the bottom deflashing system, 2 arms twin cavity mould and associated parts which will include the blow pins, cutting sleeves, the pins and dies and dye holding brackers, stripper plates.

Clearly the plaintiffs had relied on the sellers skill resulting in there being an implied condition that the machines would be reasonably fit for the purposes for which they were required. The situation here was a far cry from a purchase of a bottle of patent medicine or some common articles like an electric iron or even a television set, sold under a popular brand

name where you pick it of the shelf as it were, which is the sort of situation where the proviso could be successfully invoked. In our judgment the learned Judge was wrong in applying the proviso to s. 16(1)(a) on the facts of the instant case.

I pause to note that in England, in 1973, as a result of the test suggested in *Baldry v. Marshall* (*supra*), the proviso was removed by an amendment to the Act.

In respect of the Boe-Therm, the written complaint to the respondents was that it did not have a "separate control device on the left side of the equipment as shown in the leaflet". Some time later, the petitioners complained that it did not include a heating element which they contended was to be included in the machine they had ordered.

In response it was pointed out that in respect of the former of the complaints, that the model delivered was the improved model which did not need the missing control device and as to the other complaint, that what the respondents had offered, in response to the enquiries by the appellants, was "the Type Cool 10 without heating". That the machine was to be without the heating element or section is indeed seen to be the position in the respondents' letter of 1 March 1977 at p. 473 of the Record of Appeal. The particulars of the Boe-Therm set out in the packing list sent to the appellants together with the invoice and other shipping documents (p. 496 of Record of Appeal) also state that the machine supplied was without the heating element. PW2 the managing director of the plaintiffs who was the main witness for the plaintiffs relied on the invoice at p. 495 of the Record where the words "without heating element" were omitted from the description of the machine. However the offer (which was accepted) was for the machine "without heating". The invoice in any event does not say otherwise and was delivered with the packing list in which it was clearly stated that the equipment was without the heating element. The appellants also sought to rely on what PW2 called a leaflet and on an instruction manual each of which appears to be for a machine with the heating equipment.

However there can be any number of leaflets, brochures, advertisements, letters and so on but in the final analysis what it comes down to is, what was offered and what was accepted. Here, as has been seen, the offer expressly excluded the heating section or element and that appears to be the offer that was accepted. It is important to note that consistent with that, there is no record of the petitioner taking issue contemporaneously with the respondents or the manufacturers in respect of the "without heating" aspect of the machine. In his testimony PW2, referring to the Boe-Therm, said at p. 68 of the Record of Appeal:

> I agree that nowhere in the correspondence did I say that the BT-10 should come with the heating section.

In our judgment the plaintiffs had failed to prove that the Boe-Therm was to be supplied with the heating section or element. The finding of the Judge on this aspect of the matter has to be and is affirmed. Further, and in any event how and to what extent the lack of the heating element in the Boe-Therm affected the plaintiffs has not been explained or explained with the clarity expected of a plaintiff suing for damages.

Apparently having the heating element in the Boe-Therm would have enabled the appellants to manufacture the caps for the bottles in the Alpla simultaneously as the bottles were being made. At p. 87 of the Record PW2 went on to testify that:

> If the BT (i.e., the Boe-Therm) came with heating I could use both the BT as well as the ABM (i.e., the Alpla) simultaneously.

However he went on to say in the next sentence: *a*

> Even without the heating I could still use both simultaneously with the aid of my own equipment.

It follows that even if the Boe-Therm was to have come with the heating element, without any evidence of any reduction of the intrinsic value of the equipment, about all that the appellants are entitled to in damages is the cost of mitigating the damage i.e., the cost of *b* bringing to aid PW2's "own equipment". There is no evidence of such reduction of value or of such costs or of what using other equipment entailed, in respect of time, inconvenience and so on. We are of the opinion that the learned trial Judge was justified in finding no merit in the plaintiffs' complaints (and on the claims arising therefrom) in respect of the Boe-Therm.

As to the alleged missing items in respect of the Alpla, the contention of the respondents *c* was that they were "additional attachments" which it was pointed out, and as has been seen, were specifically excluded from the written offer made by the respondents. The blow heads, it was explained without challenge, were in fact the ones required by the petitioners and were as a result of a typing error erroneously described in the packing list.

The manual was replaced on or about 16 December 1977 but the appellants again complained *d* that it appeared to be for some other model of machine and in any event "technical specification" with regard to the die, blow pins and cutting sleeves were not included and the last few pages of the manual appeared to be missing. In respect of this the respondents contended that the manual was meant for the h.s. 40/2000 as well as the other model and the die, blow pins and cutting sleeves had to be fabricated by whoever makes the moulds on the basis of measurements to be taken by the mould maker. *e*

Now the Alpla was eventually commissioned by one Lim Chim Sing who testified as PW5. He had been at the relevant time a "service engineer" with the respondent company and testified that he had been sent by the respondents to commission the Alpla.

One of the problems in this case was that the witnesses were testifying in 1991 in respect of events that had taken place well over ten years earlier i.e., from about the end of 1977 and *f* up to mid 1978. Fortunately, at least as far as the role played by Lim was concerned, there were his service reports which were produced from which, supplemented by the oral testimony, a fairly clear picture of the events *vis-a-vis* the commissioning and malfunctioning of the Alpla can be discerned. PW2 can be deemed to have expressed his agreement with the contents of each of the reports, save one, by countersigning them particularly as in one report, in countersigning it, PW2 noted his disagreement with part of Lim's opinion. *g*

Lim's earliest report, of 29 November 1977, shows that he ascertained that all the components of the Alpla as per the packing list had been delivered. The machine was put together but he notes that it could not be commissioned because of the lack of "nozzle blow pin mould" and of water and electricity supply.

As to the electricity supply, 3 phase wiring was required and was not available in November *h* 1977 at the plaintiffs' premises where the Alpla was to be installed.

Special moulds were needed for each type of bottle to be produced. Each mould had to be attached to the Alpla with components referred to as a die, a blow pin or nozzle and cutting sleeve all of which, according to the respondents, had to be fabricated by the mould maker. The moulds themselves were designed by the manufacturers of the Alpla who supplied the appellants with drawings of the design on the basis of which the mould maker was to fabricate *i*

the mould. It was the respondents' case that it was for the appellants to employ a mould maker to fabricate the moulds as well as the related die, blow pin or nozzle and cutting sleeve. The plaintiffs on the other hand contend, but not seriously, that it was for the manufacturers to supply the moulds. The moulds did not come cheap. There is some evidence that some RM86,792 was incurred by the appellants for the fabrication and supply of moulds that they needed which alone suggests that it could not have been in the contemplation of the parties that the fabrication of the moulds were included in the agreed cost of the Alpla of DM66,560 (in 1977 the ringgit was almost at par with the DM).

Consistent with the respondents' contention that it was for the plaintiffs as a separate exercise to have the moulds and the related components which had to be custom-made, fabricated, is the fact that the plaintiffs did ask the respondents to give a quotation for certain moulds and for the relevant components. But they eventually placed orders with a local mould maker (who had been recommended to them by the respondents) to manufacture various types of moulds for them. At p. 601 of the Record is a letter of the plaintiffs to the mould maker dated 14 August 1981 upbraiding the mould maker in respect of the poor quality of the moulds that had been fabricated by him for the plaintiffs from as far back as March 1978. We could find nothing in the contemporaneous correspondence that suggests that the responsibility for providing the moulds, save one ounce mould was that of the respondents. The submissions made by Counsel for the plaintiffs in the Court below suggest that it was accepted by the plaintiffs that the moulds were not part of the contract for the supply of the Alpla.

It is our judgment, on the totality of the evidence, that it was for the appellants to have had the moulds fabricated. It is also our judgment that each set of the pin, die and blow pin or nozzle and cutting sleeve had to be fabricated together with the relevant mould by the mould maker, which the plaintiffs caused to be effected using the local mould maker Lee Kum Chuen who testified as PW4. The one one ounce mould which was also made by the mould maker Lee but at the instance of the manufacturers of the Alpla was given to appellants gratuitously. The related pin, die and nozzle and cutting sleeve in respect of this mould does not appear to have been provided by the respondents and appears to have been fabricated by Lee on the instructions of the plaintiffs.

Now, there is no doubt that the appellants ran into a whole host of problems in respect of the production of bottles. They put the blame on defects in the Alpla but the manufacturers contend that there was nothing wrong with their machine. They contend that the problems that the appellants encountered were, in respect of the initial delay, that the appellants did not have both the water supply and 3 phase electrical wiring which were required for the safe and proper running of the machine. In respect of the rest of the problems other than delay the manufacturers and the respondents blamed the poor quality of the component parts of the moulds i.e., the die, blow pin or nozzle and cutting sleeves. PW2 contended that the poor quality of those components was because the design drawings of the mould provided by the manufacturers were faulty. Neither he nor anybody has explained to the Court what in fact was wrong with the drawings that could result in the components to the moulds being faulty. The mould maker in his testimony had referred to the design drawings. Even he was not asked whether there was anything wrong with the drawings. Further he had testified that on the instructions of PW2 he had not followed the drawings "100%" because PW2 had wanted him to have the shoulders of the bottles "more rounded" than as prescribed in the design drawings.

Apart from fabricating the moulds according to the drawings, the mould maker had to take measurements of the Alpla to fabricate the die, nozzle and blow pin which had to be, as has been seen, custom made and aligned to fit the machine. Measurements were taken. Lim's report of 7 December 1977 shows that he accompanied Lee to the machine for Lee to take the relevant measurements.

It would appear that it was only on 10 January 1978 that the required water supply was available (electricity was available earlier on 20 December 1977). The report of 10 January 1978 shows that the components for the mould were by then available but they were found to be "too big" and one component fabricated by Lee, that presumably had to be screwed on, had a right hand thread of a left hand thread. The mould maker Lee in his testimony denies that there was a problem with the thread. But he admitted that one component did not fit because its diameter was too big. He had to and modified it. He also testified that he had been ordered by PW2 to modify the one ounce mould. It was put to him that the problems that the plaintiffs encountered with the Alpla were because of the defects in the fabrication by him of the moulds and their component parts. He said that they were not defective "as they were made according to the diagram". However it has to be remembered that earlier in his testimony he had said that he had not followed the "diagram" 100%. He went on to testify that the component parts "could go wrong in about 10% of the cases and if it went wrong it could be easily rectified".

Lim's service report of 12 January 1978 shows that he was back with the mould maker Lee at the machine, for measurements to be taken to rectify the error in the components Lee had made. On the next day 13 January 1978 it was found that the blow pin was still incorrect. Lim reported, "this time the screw in length too short". On 17 January 1978 Lim reports "Blow pin" tested OK and machine running fully automatic on dry cycle". However on running it on 18 January 1978 with the plastic material that was to be "blown" into bottles, Lim reported,

> the material came out from and around the nozzle. It was found that the sealing of die was incorrect causing it to slant against the pin. Informed client of the mistake made with the pin and die.

We pause to note again that all these reports were countersigned by the plaintiffs' representative PW2.

On 19 January 1978 it was again found that the pin was "very much slanted". Some adjustments were made. Then it was found that the cutting knife which to be effective had to be heated was not getting heated. Lim found that this was because a electrical relay contact was dirty.

The report of 20 January 1978 shows that at last the machine functioned well until a faulty switch caused it to come to a stop. On replacing the switch Lim reported that "the machine was running perfectly OK. Customer was very happy with the performance of the machine."

In countersigning the report two days later on 23 January 1978, PW2 stated "the machine is running well but the material not coming out evenly due to slanting of the "pin"."

The next visit of Lim to the machine appears to have been on 21 February 1978 when according to his report there were problems which he attributed to the pin and die having been incorrectly made resulting in the plastic material that "extruded" i.e., forced through the die and the nozzle, "is either slanted or oozing out at the side of the nozzle". He also wrote that there were problems because the plaintiffs were using "100% recycle material". This is the one report that PW2 had refused to sign. By a letter dated 22 February 1978 to the plaintiffs the respondents reiterated Lim's opinion that the problems were caused by the

incorrectly made pin and die. Going by the reports, Lim's next visit was in April 1978. On 4 April 1978 an electronic switch was changed. Problems found on 7 April 1978 according to Lim were caused by an electrical short circuit that was caused by the removal of some part of the machine by the plaintiffs. PW2 noted that was not true. However it would appear that the machine was effectively repaired by Lim. On 19 April 1978 Lim found that there was again something wrong with the electrical supply resulting in "shorting". He also found that one of the 3 phases of the electricity supply was not working. On 26 April 1978 he appeared to have reconfirmed that to be the problem and advised the plaintiffs to refer the matter to the National Electricity Board. Lim, according to the report, brought in an expert on compressors who on 26 April 1978 confirmed that the motor had been blown out or "burnt" because it was run on only two phases. All these reports were signed by PW2 without comment. All PW2 could say in his testimony in respect of this was that he could not understand how this could have happened. Clearly neither the respondents nor the manufacturers of the machines can be blamed for the delay in having the machines commissioned. And apart from the dirty electrical contact point that caused problems in respect of the heating of the cutting knife (which problem was rectified by cleaning the point) and the faulty switch (which was replaced) all the problems encountered before the report of 1 August 1978 appear to have been due to either faulty electrical supply and/or the faulty fabrication of the component parts of the moulds for neither of which the respondents and/or their principals can be held to be responsible.

The next report, the last by Lim, which was dated 1 August 1978, also countersigned by PW2, sets out the complaints by the plaintiffs which are referred to as "minor problems".

> 1. 8. 1978 Presently the m/c is on production but with minor problems still has to be solved. Problems given by client is as follows:
>
> (1) Intermittent heating of the parison cutting knife.
>
> (2) Material oozes out through the nozzle together with the support air.
>
> (3) Blow mandrel automatically comes down slowly thus hitting against the mould after a few cycles of operation.
>
> (4) Extruder screw varies in speed.
>
> (5) Extruder gear box is with only a little quantity of grease as has been removed by client during their service. The reason is because the grease tend to seep into the screw. Advised client this is not advisable as it might cause further damage to the gear box. Date for service for the abovementioned has still to be fixed by client.

PW2 in his testimony said the problems set out in this report were never solved. He said:

> For the whole of 1978 and 1980 we tried and believed we could call others to repair the machine as the defendant's technician was grossly incompetent and did not know the machine properly, not supplied with proper manual. Everytime we call a technician from other companies first thing he would ask is for the instruction manual, otherwise they refuse to touch the machine. After that we did not operate the machine.

In cross-examination Lim said that he prepared his reports after he had rectified all the complaints but on re-examination he said that the defects set out in the 1 August 1978 report were not rectified "because it comes intermittently". He also said that he did not know if there were similar complaints after 1 August 1978. "It is possible" he said that the client had attended to the complaints themselves without reference to him. Items (2) and (3) of the complaints, he thought, were matters not the problem of the manufacturers.

DW1 Durangor Markus was a mechanical engineer working with the people who at the time of the trial were the manufacturers of the Alpla h.s. 40/2000 machines. In his testimony he explained with some clarity as to how the machine functioned. He was referred to the Lim report of 1 August 1978. In his testimony he dealt with each of the problems. He shared Lim's view that the problems were minor problems.

As to item (1) the intermittent heating of the parrison cutting knife, he thought that it must have been a defect in a component called a sleeve and that there could have been a electrical contact problem both of which he considered minor problems that could have been easily rectified, by changing the sleeve in respect of the one and by cleaning the contact in respect of the other.

As to item (2) he thought it could have been a mistake in re-assembling what is called the parrison head which in his opinion could easily have been rectified. He also thought it could be a defect in the nozzle which as has been seen was fabricated as a component of the mould.

Item (3) was caused by something being damaged or wrongly adjusted. He thought that it could have been rectified by changing certain switches.

Item (4) he thought should not happen in that in his opinion it was simply a question of adjusting the speed.

As to item (5), i.e., escape of grease from the gear box, he explained that the gear box was sealed and in any event did not contain grease.

In cross-examination this witness testified that all the defects shown in the 1 August 1978 report could have been easily rectified except item 3. We pause here to look again at the further amended statement of claim to find that the plaintiffs plead that after July/August 1978 the only remaining complaint they had was the lack of the heating element in the Boe-Therm. Paragraph 10 and 11 of the statement of claim are as follows:

> 10. On 28 February the plaintiffs gave notice to the defendants that the (if) defendants were unable to correct the defects and put the equipment in working condition over a period of almost three (3) months the plaintiffs would itself purchase the missing/defective parts from other suppliers and repair the equipment as far as was possible to put it in working condition and thereafter claim all losses sustained from the defendants.
>
> 11. The plaintiffs practically completed the remedial work on the equipment which involved fine and tedious adjustments from time to time and began production in July/August 1978 but one equipment the Boe-Therm temperature controller continues to be without heating requiring the blow moulding and injection moulding to be done separately instead of simultaneously.

Paragraph 11 is an unequivocal statement that the difficulties with the Alpla were surmounted by August 1978. DW1 Durangor Markus' testimony that the problems set out in 1 August 1978 report (referred to therein as minor problems) could easily be rectified is consistent with the plaintiffs' said para. 11. Significantly the items in the Particulars of Special Damage claimed in the statement of claim is restricted to the 8 months ending in August 1978:

Particulars of Special Damage

1. Bank interest for 8 months at approximately 10% p.a. on RM75,000 (part purchase price)	5,000
2. Rental paid for premises (RM550 x 7 months + RM750 for July 1978)	4,600
3. Salaries and wages to employees for 8 months	21,600
4. Repairs and modification/improvisation of parts	15,000
	RM46,200

It would seem that by "repairs modification and improvisation of parts" the plaintiffs had surmounted the problems with the Alpla within 8 months of the installation of the machines i.e., by August 1978 which narrows down the period for judicial enquiry to November 1977 to August 1978. We pause to note that what exactly was repaired and modified and improvised for RM15,000 has not been disclosed to the Court. Apart from the evidence of DW1, the Court had the opinion of another engineer, PW4 Lim Kim Seng, in respect of the technical aspects of the Alpla. However we did not find this expert's evidence particularly helpful. For one thing he had not examined the machine while it was operating. *Inter alia* he pointed out to various aspects of the machine which he thought were not properly installed. No doubt he ended his testimony by informing the Court, in answer to a question put by the Court, that the defects he had highlighted may have contributed to the malfunctioning of the machine. However there is nothing in the record which suggests that he was aware what the problems were. Startlingly we find that he wrote his report on 5 January 1978 at which stage there had been no attempt to commission the machine because *inter alia* the required water supply and the moulds and the components of the moulds were not available!

The evidence suggests that at least up to August 1978, each time there was a problem with the Alpla the service engineer Lim was sent for and as he has set out in written reports what the complaints were and what if anything he did in respect of them, the Court is in a position to come to a conclusion as to what was the cause of the problems. We have examined the reports and the related evidence including that of PW2 and we cannot but reiterate that apart from problems with the electric supply (not the fault of the respondents or the manufacturers), the substantial part of the problems were caused by defects in the moulds and/or the components that came with the moulds. Consistent with this finding is the letter to the mould maker by the plaintiffs' managing director PW2 dated 14 August 1981 referred to earlier in this judgment, where he is seen writing with relevance to orders made in early 1978 for moulds:

> You have billed us for moulds that have been completed/partly completed or unsatisfactorily in accordance with our technical drawings and specifications.

The letter goes on to give some particulars of defects in some 7 different moulds that had been fabricated by the mould maker.

There was no evidence for the Court to hold that the manufacturers' design drawings caused the mould maker to make defective moulds and in any event as has been seen the mould maker's evidence which was not contradicted was that he had been instructed by the plaintiffs not to follow "100%" the drawings.

Another complaint of the appellants was that the Alpla did not have what was referred to as a deflashing device. This is a device to cut the "tails" of each bottle as it was blow moulded. The evidence is far from clear whether the plaintiffs were contending that the device was to be part of the machine or that the machine did not have a provision for the attachment of such a device.

The respondents had contended without any effective challenge that this deflashing device was another additional part that had to be ordered separately and which, like the components to the moulds, had to be fabricated by the mould maker one for each mould because it had to "fit" the mould concerned if it was to function effectively. In any event there was no evidence of the extent of damage suffered (if any) as a result of the alleged omission to provide the alleged missing component.

In the face of the lack of clarity in the plaintiffs' contention in respect of this aspect of the case and the lack of evidence to support either of the two stands that can be said to have been taken by the plaintiffs in respect of the deflashing device, we have to and hold that there was no merit in this aspect of the plaintiffs' complaints.

It is our judgment the plaintiffs failed to prove liability on the part of either of the manufacturers or the respondents. We uphold the learned Judge's judgment "that (he) was satisfied on a preponderance of evidence that the plaintiff has failed to show that the defendant or the manufacturers of both the equipment were liable."

The learned Judge had gone on to hold that in any event the plaintiffs had failed to prove the damages as prayed or at all.

A claim for damages special and/or general has to be based on evidence of damages suffered.

In respect of the special damages claimed, the learned Judge pointed out that "sad to say not one iota of evidence was led by the plaintiffs on any of the items claimed under special damages." In *Sum Kum v. Devaki Nair & Anor.* [1964] 30 MLJ 74 at 75, Thomson LP said:

> I would, however, add one observation of a general nature. This is by no means the first appeal this Court and its predecessor have had to deal with in which somewhat insufficient attention has been given at the trial to the question of giving adequate evidence on the question of quantum of damages. It is for Counsel in such cases to devote a little more attention to that aspect of the matter in future. As Lord Goddard said in the case of *Bonham-Carter v. Hyde Park Hotel, Ltd.* [1948], 64 TLR 177 178:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

No attempt or effective attempt had been made to prove the special damages claimed. the rejection by the learned Judge of the claim for special damages is affirmed.

There were 3 heads of damages claimed as general damages. First there is a claim of RM275,000 said to be reimbursement to be paid to PW1 in respect of a guarantee. Apparently the plaintiffs had borrowed money from Bank Buruh on the security of a guarantee given by PW1. The bank had called on the guarantee and PW1 had paid up and apparently expects the appellants to reimburse him. There is no evidence of any claim in respect of the amount or at all by the guarantor on the appellants. And in any event the appellant plaintiffs have

failed to prove the nexus between that guaranteed amount and the alleged breaches of the contract *vis a vis* the Alpla and the Boe-Therm. We agree with the learned Judge that this claim as presented was untenable.

Similarly the nexus (if any) between the next claim for "RM200,000 being paid up capital... which was completely dissipated" and the contract for the purchase of the two machines (or breaches thereof) has not been shown and it follows that there is no basis for this head of damages as against the defendants.

The last head of the claim for general damages was loss of expected profits of RM626,606.92 as aggregated for the 3 years 1978, 1979 and 1980. Here again what the plaintiffs did was to throw the figures at the head of the Court without proving any of the items that make up the amount. Further, as has been seen, by para. 11 of the statement of claim the plaintiffs have stated that the problems with the Alpla were surmounted by August 1978. It follows that if there was loss of profits thereafter it must have been for reasons which have nothing to do with the respondents or their principals. And even for the period up to August 1978, as far as the evidence goes, it was not as if there was no production at all.

Now, what the plaintiffs had relied on were projections made by one Sandanamsamy (who was not called) and Anthony Segamony, PW2, for the years 1978, 1979 and 1980. These projections appear to have been made to support the plaintiffs' application to the bank for credit facilities and which appears to have been made sometime before the plaintiffs decided to invest in the machines. In cross-examination, PW1 the chairman of the plaintiff company, said with reference to the projections,

> The projections were prepared by Anthony Segamony - when he made the projections the company had not secured any contracts for the supply (of) plastic bottles. The projections were made partly for the purposes of bank facilities.

There is no evidence of contracts for the supply of bottles having been entered into, before or after the machines were commissioned or at all. Actual figures in respect of *inter alia* production and sales in 1978 were not divulged to the Court. It would seem that there were no audited accounts after 1976. The explanation given for this is startling - they did not have the funds to have the accounts audited!

In *Cullinane v. British "Rema" Manufacturing Co. Ltd.* [1954] 1 QB 292. On the failure of a clay pulverising machine to pulverise at the warranted rate, it was held that the buyer of the machine was not entitled to claim damages based both in respect of the capital expended and also for loss of profits. Which is what the plaintiffs here have tried to do, claiming both the capital "dissipated" as well as loss of profits. As to loss of profits Jenkins LJ said at p. 308 of *Cullinane (supra),*

> ...the case is one in which the plaintiff can claim damages for the breach of warranty, *the loss of profit he can show that he would have made if the plant had been so warranted.* (Emphasis supplied).

The projection to be worth anything should have been backed by evidence of *inter alia* wages to be incurred e.g., employment contracts, costs of material e.g., quotations from suppliers, actual prices at which medical practitioners purchased bottles and so on. In the absence of such evidence or of the like, the basis of the projections and the projections themselves appear to be mere speculation on the part of PW2 and Sandanamsamy. The learned Judge was perfectly justified in rejecting them as being mere "conjecture".

The plaintiffs having failed to prove liability and in any event having failed to prove that damages were suffered, we uphold the learned Judge's decision that the claim should be dismissed with costs. It follows that the appeal has to be and is dismissed with costs.

Hj. Abu Mansor bin Ali JCA:

As a member of this panel, I have considered this appeal. My decision is the same as that of my learned brother Justice V.C. George. I have had the benefit of reading his judgment, and I respectfully agree that for the reasons stated therein this appeal must be dismissed with costs. All orders made by the learned Judge in the Court below are affirmed. The deposit paid into Court by the appellant is to be paid out to the respondent towards account of its taxed costs.

Gopal Sri Ram JCA:

I have had the benefit of reading the judgment of my learned brother Justice V.C. George, JCA and respectfully agree that for the reasons stated therein this appeal must be dismissed with costs. All orders made by the learned Judge in the Court below are affirmed. The deposit paid into Court by the appellant is to be paid out to the respondent towards account of its taxed costs.